SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 663

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 480, AFL-CIO-CLC,
Petitioner,

versus

GULF COAST BUILDING AND SUPPLY COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the court of appeals (Pet. App. A11-A21) is reported at 428 F.2d 121. The opinion of the district court (Pet. App. A22-A26) on the motion of International Brotherhood of Electrical Workers, Local 480 AFL-CIO-CLC (Local 480) for judgment notwithstanding the verdict or in the alternative for a new trial (Pet. App. A22-A26) is reported at 71 LRRM 3212. The decisions in a companion unfair labor practice case are reported at 172 NLRB No. 64 (Resp. App. 11 - 33 *infra*) and 413 F.2d 1085 (D. C. Cir. 1969). (Resp. App. 34 - 47 *infra*.)

JURISDICTION.

The judgment of the court of appeals was entered on June 19, 1970. The petition for a writ of certiorari was filed September 7, 1970. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the exclusion of all union members from the jury panel constitutes ground for reversal where the record does not disclose such exclusion and objection to such exclusion was not raised until after verdict.

2. Whether a union engaged in common situs picketing has an affirmative duty to disabuse employees of neutral employers of the notion that the picketing was to encourage them to cease serving or working for a neutral employer where the picketing union knows that neutral employees will observe the picket line regardless of the wording on the picket sign.

STATUTES INVOLVED.

The relevant provisions of the Jury Selection and Service Act of 1968 and the National Labor Relations Act are set forth in the appendix to the petition (Pet. App. A1-A9).

STATEMENT.

Gulf Coast Building And Supply Company, Inc. (Gulf Coast) of Mobile, Alabama commenced construction of the Tracetown Shopping Center (Tracetown Center) in

Natchez, Mississippi in December, 1966. (R. 225.) On January 20, 1967, Erickson, the Business Manager of Local 480, wrote to Gulf Coast asking Gulf Coast's "careful consideration of awarding sub-contracts to qualified contractors who abide by the State and Federal approved apprenticeship training program and pay the prevailing wage scale in this area," and enclosed "a list of electrical contractors who have agreements with Local 480." (R. 226, 229, 402, 411, 520.) Gulf Coast invited bids and awarded the plumbing work to Wood Mechanical of Jackson, Mississippi and the electrical work to Gulf Electric Construction Company (Gulf Electric) of Crestview, Florida. (R. 231.) Wood Mechanical had a collective bargaining agreement with Local 480. (R. 267.) Gulf Electric did not have an agreement with Local 480. (R. 266, 304.) Gulf Coast employed mechanics and laborers from the Natchez area, some of whom were obtained through the Carpenter's Local, the Masonry Local and the Laborer's Local. (R. 233-234.)

On February 28, 1967, Local 480 began picketing the single entrance to the Traceytown Center. (R. 235, 416, 464.) The picket sign stated that Local 480 was protesting sub standard wages and working conditions of Gulf Electric, and that Local 480 had no dispute with any other employer. (R. 290.)

Erickson instructed the pickets, "don't say anything to anybody, if anybody asked them (the pickets) anything to have them read the sign." (R. 435, 443, 446.) Local 480 did not contact Gulf Electric before Local 480 began picketing. (R. 414.)

Prior to establishing the picket line, Erickson informed

several local unions that were affiliated with the Building Trades Council that Local 480 was going to establish a picket line at Tracetown Center. (R. 420, 422.) Erickson knew that it was the policy of unions affiliated with the Building Trades Council "not (to) cross the picket line" (R. 415), and Erickson "hoped" that they would not cross Local 480's picket line. (R. 415, 416, 422.) Local 480 commenced picketing in the mornings before Gulf Coast people arrived so they would recognize the picket line and stay off the job. (R. 476.)

On February 28, 1967, St. John, Gulf Coast's Project Manager, asked Erickson why Local 480 was picketing. Erickson told St. John "to read the sign" and mentioned the letter which Erickson had written to Gulf Coast on January 20. (R. 237, 417.)

Worley, a vice president of Gulf Coast, flew from Mobile to Jackson on February 28, to investigate the picket line. (R. 235.) Worley met Erickson by chance in a restaurant and inquired of Erickson the cause of the picketing. Erickson replied that he, Erickson, had told St. John to read the sign and told Worley that he, Erickson, did not want to discuss it with Worley, that Erickson's attorney would get in touch with Worley. (R. 237.) Thereafter, in a telephone conversation, Erickson's attorney informed Worley and Mitchell, President of Gulf Coast, that "you people are undermining us and we're protesting." (R. 246-247, 358.)

A picket, in the presence of Erickson, told McCollough, a truck driver for Delta Steel who approached the picket line with a load of fabricated steel (R. 320-321), "to read the sign" (R. 321), asked McCollough if he was "going to

carry it in there" (R. 324), and told McCollough that "he would appreciate. . . (McCollough) not crossing the picket line." (R. 324-325.)

On March 13, Local 480 established its picket line at 6:45 A.M., although no Gulf Electric employees reported to work until 10:00 A.M. (R. 248-249.)

On March 14, 1967, Gulf Coast constructed a second entrance called the North Gate, for use by everyone with the exception of Gulf Electric and people doing business with Gulf Electric; the original, or South Gate, was reserved for Gulf Electric and people doing business with Gulf Electric. (R. 249-250.) Local 480 continued to picket the South Gate until the South Gate was eliminated in June. (R. 250-251, 307.) Erickson instructed Local 480's pickets to keep a list of the people who went through the two gates. (R. 424, 425, 444, 449-450.) The pickets recorded the descriptions, tag numbers and contents of vehicles using the North and South Gates and turned them over to Erickson about once a week. (R. 449-450.)

Employees of Wood Mechanical returned to the Tracetown Center through the North Gate on March 15, 1967. (R. 249-250, 252.) Erickson told the membership of Local 480 that the plumbers had crossed Local 480's picket line. (R. 423.) According to Erickson, "They (plumbers) were told they would lose their membership if they crossed it." (R. 422.)

Cage and several other laborers who had been employed by Gulf Coast who were members of the Laborer's Local 747 returned to work after the North Gate was erected. (R. 331-332.) Erickson may have informed the membership of Local

480 that members of Laborer's Local 747 crossed Local 480's picket line. Cage and two other members of Local 747 were charged with crossing Local 480's picket line by Laborer's Local 747 and threatened with a fine. (R. 332, 337-338, 538.)

On the morning of March 22, after Worley informed Erickson of a proposal to have Wood Mechanical employ the electrical labor, at Worley's request, Erickson removed the picket line. (R. 258-259, 261, 267, 268, 405.) The minutes of Local 480 for March 23, 1967, state:

> Bro. Erickson reported on results of picket on Natchez Tracetown job. Wood Mechanical & Electrical has been awarded the Electrical labor on this job. (R. 429-430, 474, 522.)

The proposal was not effected and on March 23, the picketing resumed. On March 23, at a meeting arranged by Worley between Worley, Erickson, and Fleming, of Gulf Electric, Gulf Coast and Gulf Electric offered to pay Local 480's prevailing wage scale and to comply with the "prevailing working condition." (R. 266.) Erickson stated he would have to discuss this with his lawyer. (R. 266, 408-409.) Erickson was apparently unable to reach his lawyer that day, and was not heard from again. (R. 267.)

The picketing continued until June 23, 1967. (R. 442.)

Over the objection of Local 480, the court charged the jury that Local 480 was under a duty to expressly instruct employees of neutral employers that they were free to cross the picket line and to instruct employees and suppliers of Gulf Coast that had refused to cross the picket line to re-

turn to work and cross the picket line without violating any duty to Local 480. (R. 481, 496-505.)

The court also charged the jury that in order for Gulf Coast to prevail, the jury must find that (1) Local 480 knowingly induced and encouraged one or more employees of Gulf Coast, Wood Mechanical or Delta Steel to cease work, (2) with an object or purpose or intent to force or require Wood Mechanical and Delta Steel to cease doing business with Gulf Coast (R. 482-483); and, that the "key factor in this case is the object of the union's activity." (R. 487.) The court also instructed the jury on the *Moore Dry Dock*, presumption of legality. (R. 483.)

Local 480 objected to the district court's excusing union members from the jury panel for the first time in Local 480's motion for a new trial. (R. 203.)

ARGUMENT.

The principles applied by the court of appeals in affirming the district court are well settled. *Queenan v. Territory of Oklahoma*, 190 U.S. 548, 552, established the principle that a party may "not speculate on the chances of getting a verdict" and after verdict object to the composition of the jury. The court of appeals correctly followed the practice of considering all instructions together which was ini-

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Sailors' Union of the Pacific (Moore Dry Dock Company) 92 NLRB 547, 549 (1950).

Pertinent excerpts from the instructions are set forth in the appendix to this brief. (Resp. App. 48-52, *infra*.)

Counsel does not agree with petitioner's statement of how the union members were excluded by the district court. (Petition pp. 3-4, 21.)

tially approved by this Court in *The Patapsco Insurance Company v. Southgate*, 5 Peters 604, 619.

Whether the substance of the jury charges properly state the applicable law turns upon the facts of this case and will have little, if any, effect on anyone except the litigants.

Moreover, the alleged improper jury charges requiring affirmative action by Local 480 are in accord with the decisions of the Board. The Board, with court approval, has interpreted section 8(b)(4) to require affirmative action on the part of a union engaged in common situs picketing to "disabuse . . . employees (of neutral employers) of the notion that the picketing was to encourage them to cease serving" a neutral employer. *General Truck Drivers, Chauffeurs, Warehousemen & Helpers, Local 270, (Diaz Dryage Company)*, 117 NLRB 885, 886 (1957), enforced 252 F.2d 619 (D. C. Cir. 1958), cert. denied 356 U.S. 931. In *Seafarers' International Union of North America (Superior Derrick Corporation)*, 122 NLRB 52, 55 (1958), enforced in relevant part 273 F.2d 891, 895 (5th Cir. 1960), cert. denied 364 U.S. 816, the Board held that where, as here, a union "could reasonably anticipate" that employees of neutral employers "would not cross the picket line, regardless of the legend on the picket signs," the union was under an affirmative duty "to make clear" to the employees of neutrals "that the picketing was not directed against them in order to minimize any possible interference with the work of the neutral employer."

---

[1] Other cases where the Board has held that a union has an affirmative duty to make clear that common situs picketing is directed solely against the primary employer are: *Brewery And Beverage Drivers*

Assuming that the instructions pertaining to liability were erroneous, Local 480 was not prejudiced because Gulf Coast was entitled to a partial summary judgment or directed verdict on liability as the finding of the Board that Local 480 violated the Section 8(b)(4) of the National Labor Relations Act in the companion unfair labor practice case was res judicata as to liability in this § 303 action. *Painters District Council 38 v. Edgewood Contracting Company*, 416 F.2d 1081 (5th Cir. 1969).

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIS C. DARBY, JR.,
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And Workers, Local No. 67 (Washington Coca Cola Bottling Works, Inc.), 107 NLRB 299 (1953), enforced 220 F.2d 380 (D. C. Cir. 1955); *Drivers, Chauffeurs and Helpers Local 639 (District Distributors, Incorporated)*, 122 NLRB 1259, 1262 (1959); *Local No. 636, Plumbing and Pipefitting Industry (Westinghouse Electric Corporation)*, 123 NLRB 225, 230 (1959), enforced in relevant part 278 F.2d 858 (D. C. Cir. 1960); *Sheet Metal Workers International Association, Local Union No. 299 (S. M. Kisner and Sons)*, 131 NLRB 1196, 1201 (1961); *International Brotherhood of Electrical Workers (Ets-Hokin & Galvan, Inc.)*, 138 NLRB 993, 1000 (1962); *Glaziers' Local Union No. 513 (Cupples Products Corporation)*, 148 NLRB 1648, 1650 (1964); *Glaziers' Local Union No. 513 (Cupples Products Corporation)*, 158 NLRB 1621, 1625 (1966); *Millwrights Local Union 1102 (Darin & Armstrong, Inc.)*, 162 NLRB 217, 218, (1966), enforced 403 F.2d 219 (6th Cir. 1968).

172 NLRB No. 64 (1968) Resp. App. 11 *infra*, enforced 413 F.2d 1085 (D.C. Cir. 1969) Resp. App. 34 *infra*.

CERTIFICATE OF SERVICE.

I, Willis C. Darby, Jr., one of the attorneys for Gulf Coast Building And Supply Company, Inc., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October 1970, I served copies of the foregoing BRIEF FOR THE RESPONDENT IN OPPOSITION on International Brotherhood of Electrical Workers, Local 480, AFL-CIO-CLC by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Dixon L. Pyles, Esquire, its Chief Counsel, at 507 East Pearl Street, Jackson, Mississippi 39201.

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APPENDICES

APPENDIX A.

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 15-CC-302

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 480, AFL-CIO,

and

GULF COAST BUILDING & SUPPLY COMPANY, INC.

DECISION AND ORDER.

On January 24, 1968, Trial Examiner Sydney S. Asher, Jr. issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel filed cross-exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record of this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, International Brotherhood of Electrical Workers, Local 480, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., June 26, 1968.

FRANK W. McCULLOCH,
Chairman.

JOHN H. FANNING,
Member.

GERALD A. BROWN,
Member.

In affirming the Trial Examiner's finding of an 8(b)(4)(B) violation, we do not, in the circumstances of this case, rely upon his conclusion that evidence of Respondent's unlawful object was reflected in the fact that Respondent's picketing did not conform to the standards set forth in *Sailor's Union of the Pacific, AFL (Moore Dry Dock Company*, 92 NLRB 547, in that Respondent "did not seek permission from Gulf Coast (the general contractor) to picket inside the Tracetown project closer to where Gulf Electric's employees were working."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case 15—CC—302

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 480, AFL-CIO

and

GULF COAST BUILDING AND SUPPLY COMPANY, INC.

Harry L. Hopkins, Esq., for the General Counsel.
Willis C. Darby, Jr. (Kilborn, Darby and Kilborn), of Mobile, Ala., for Gulf Coast.
Dixon L. Pyles, Esq. (Pyles and Tucker), of Jackson, Miss., for the Respondent and for witnesses Ralph Brummett and John Erickson.

TRIAL EXAMINER'S DECISION.

SYDNEY S. ASHER, JR., Trial Examiner: On March 28, 1967, Gulf Coast Building and Supply Company, Inc.,

Member Manning, in agreeing that Respondent violated Section 8(b)(4)(ii)(B) of the Act, *relies only on evidence that Respondent's pickets induced McCullough, an employee of a neutral employer, to refuse to cross the picket line.* See his general views as expressed in *International Brotherhood of Electrical Workers, Local Union No. 11 (General Telephone Company of California)*, 151 NLRB 1490 footnote 4; and *International Brotherhood of Electrical Workers, Local Union No. 11 (L.G. Electric Contractors, Inc.)*, 154 NLRB 766 at p. 769.

Mobile, Alabama, herein called Gulf Coast, filed charges against International Brotherhood of Electrical Workers, Local No. 480, AFL-CIO, Jackson, Mississippi, herein called the Respondent. Amended charges were filed on July 25, 1967. On August 22, 1967, the General Counsel of the National Labor Relations Board issued a complaint against the Respondent alleging that since on or about February 28, 1967, Respondent has induced and encouraged employees of Gulf Coast, Wood Mechanical Contractors, Delta Steel Company, and other persons, to engage in strikes, and has threatened Gulf Coast, Wood Mechanical Contractors, Delta Steel Company, and other persons; and that an object of this conduct is to force or require Gulf Coast, Wood Mechanical Contractors, Delta Steel Company, and other persons to cease doing business with Gulf Electric Construction Company, Inc., herein referred to as Gulf Electric. It is alleged that such conduct violates Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act. Thereafter, the Respondent filed an answer denying most of the material allegations of the complaint.

Pursuant to notice, a hearing was held before me on October 9, 10, and 11, 1967, at Jackson, Mississippi. All parties were represented and were afforded an opportunity to participate fully in the hearing. Since the close of the hearing all parties have filed briefs, which have been duly considered.

---

[1] Immediately prior to the opening of the hearing, with the consent of all parties, a prehearing conference was held at Jackson, Mississippi. All parties were represented and were afforded an opportunity to participate fully therein.

Upon the entire record in this case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT.

I. The Board's Jurisdiction.

Gulf Coast Building and Supply Company, Inc., is an Alabama corporation with its principal office and place of business in Mobile, Alabama, where it is engaged in commercial and residential construction. It is the general contractor for the construction of the Tracetown Shopping Center located in Natchez, Mississippi, herein called the Tracetown project. During the 12-month period preceding August 22, 1967, Gulf Coast purchased materials valued at more than $50,000, which were shipped directly to it at the Tracetown project from points outside the State of Mississippi.

At all material times, Gulf Electric Construction Co., Inc., a Florida corporation, herein called Gulf Electric, has performed work at the Tracetown project pursuant to a subcontract with Gulf Coast, for which services Gulf Electric has received or will receive during a 12-month period beginning in February 1967 in excess of $100,000.

At all material times, Wood Mechanical Contractors, herein called Wood, and Delta Steel Company, herein called Delta, have performed work at the Tracetown project pursuant to subcontracts with Gulf Coast. Both Wood and Delta are, and at all material times have been, engaged in the building and construction industry.

In view of the above facts, it is concluded that Gulf Coast and Gulf Electric are, and at all material times have been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Respondent and its Agents.

The complaint alleges, the answer admits, the Board has found, and it is now found that the Respondent is, and has at all material times been, a labor organization within the meaning of Section 2(5) of the Act. The complaint alleges, the Respondent admitted at the prehearing conference, and it is found that John L. Erickson is, and at all material times has been, business manager of the Respondent and its agent within the meaning of Section 2(13) of the Act.

The complaint alleges and the answer denies that Herbert Robinson, Jeff Laird, and Richard Walters are, and at all material times have been, authorized pickets and agents of the Respondent within the meaning of the Act. Erickson admitted that the Respondent authorized the picketing described hereafter, and that Robinson, Laird, and Walters were paid by the Respondent to conduct such picketing. Accordingly, in agreement with the complaint, it is found that, at all material times, Robinson, Laird, and Walters were agents of the Respondent within the meaning of the Act.

International Brotherhood of Electrical Workers, Local 480 (Vickers, Inc., Div. of Sperry Rand), 156 NLRB 629, 630.

The complaint alleges, and the answer denies, that certain other individuals were agents of the Respondent. I find it unnecessary to decide these issues.

III. The Unfair Labor Practices.

A. Events.

The complaint alleges, the answer admits, and it is found that, at all material times, the Respondent was engaged in a labor dispute with Gulf Electric. *It had no labor dispute with Gulf Coast* or any employers engaged in work at the Tracetown project other than Gulf Electric.

On February 28, 1967, the Respondent began picketing the only entrance to the Tracetown project. The picket bore a sign reading:

NO DISPUTE WITH
ANY OTHER EMPLOYER
I.B.E.W. LOCAL 480
PROTESTS
SUB STANDARD WAGES
AND CONDITIONS OF
GULF ELECTRIC CONSTR. CO., INC.
ELECTRICAL CONTR.
NO DISPUTE WITH
ANY OTHER EMPLOYER

Some employees of neutral subcontractors, including some of Wood's employees, refused to cross the picket line. Other employees crossed the picket line and went to work inside the Tracetown project.

On either March 15 or March 30[1] Gulf Coast opened a

[1] All dates herein refer to the year 1967.

new "south gate" to the Tracetown project. It bore a sign reading:

> South gate. Gulf Electric Construction Company, Inc. This entrance reserved for employees of, and carriers of suppliers making deliveries to, Gulf Electric Construction Company, Inc.

At the same time, a sign was placed over the original gate which read:

> North gate. This entrance reserved for employees of, and carriers and suppliers making deliveries to (here some names were listed). Employees of carriers and suppliers making deliveries to Gulf Electric Construction Company prohibited from using this gate. Employees or carriers of suppliers making deliveries to Gulf Electric Construction Company must use south gate.

There was also an arrow pointing toward the south gate. Upon the establishment of the south gate, the picket moved from his former location to the new south gate. While the south gate was in existence, no picketing was conducted at the north gate. In early June Gulf Coast demolished the "south gate," leaving the original gate as the sole remaining entrance to the project. The Respondent's picket then returned to the position he had occupied before the "south gate" had been opened.

The picketing ceased on June 23. All in all, there was picketing at one gate or the other continuously from February 28 until June 23, except for part of the day on March

22. Throughout this period the employees of Gulf Electric continued to work at the Tracetown project behind the picket line.

B. Violation of Section 8(b)(4)(i)(B).

1. Inducement and encouragement.

a. *Contentions of the parties.*

The complaint alleges that, since on or about February 28, 1967, the Respondent "has induced and encouraged . . . employees of Gulf Coast, Wood Mechanical Contractors, Delta Steel Company, and other persons to refuse to perform services for their respective employers and to engage in work stoppages . . . has picketed or caused to be picketed the Tracetown (project), and has ordered, directed, instructed, requested, and appealed to the (said) employees . . . to refuse to perform services and to cease work for their respective employers." The answer denies these allegations.

b. *From February 28 to March 15 or 30*

The Board has held

> picketing at the secondary employer's premises alone is not *per se* "inducement or encouragement" within the meaning of clause (i). Whether picketing constitutes "inducement or encouragement" of employees of secondary employers to engage in work stoppages or refusals to perform services is issue to be re-

solved in the light of all the evidence in a particular case.

What is the evidence here?

During the period from the commencement of the picketing until the opening of the new "south gate," the Respondent placed a picket at the only entrance to the project then in existence. This was the entrance through which employees of neutral employers entered the jobsite.

Clayton Spillman, business representative of Laborer's Local 747 in Natchez, testified:

> Q. Is it customary in this area for one building trades union to honor the other building trades picket line?
>
> A. I am sure that it is.

And Erickson admitted on cross-examination:

> (By Mr. Darby):
>
> Q. What was the policy that you thought that existed among the building and trades unions and their members?

Upholsterers Frame & Bedding Workers Twin City Local No. 61, affiliated with Upholsterers' International Union of North America, AFL-CIO (Minneapolis House Furnishing Company and L. S. Donaldson Company), 132 NLRB 40, 41. See also Local 459, International Union of Electrical, Radio and Machine Workers, AFL-CIO (Friden, Inc. and Novelty Veiling Co., Inc., 134 NLRB 598, 599. But compare International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Over-the-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local No. 41, A.F. of L., 96 NLRB 957, 958; and Local No. 25 Bakery & Confectionery Workers International Union of America, AFL-CIO (King's Bakery, Inc.), 116 NLRB 290, 293.

> A. It is . . . common knowledge that most craftsmen that belong to the building trades or individual craft unions do not cross the picket signs if it is by another craft, or even by their own building and trades.

The correctness of the views thus expressed by Spillman and Erickson is attested to by the fact that the Respondent's picketing at the entrance to the Tracetown project did, indeed, keep some employees of neutral employers from performing work behind the picket line. *But this was not all.* On March 1 Walter McCullough, a truckdriver employed by Delta, arrived at the Tracetown project with a truckload of steel consigned to Gulf Coast. The truck bore Delta's name on its side. Seeing two pickets at the entrance, McCullough stopped his truck, got down, and approached them on foot. He testified:

> TRIAL EXAMINER:
> Did you talk to both of them?
> THE WITNESS:
> Yes, sir.
> TRIAL EXAMINER:
> So the three of you put your heads together, or did you talk to them individually?
> THE WITNESS:
> No, sir. I tried to talk to them individually. And I just told them that—when I walked up there, *they just told me not to cross the picket line.* (Emphasis supplied.)

From this it is concluded that the Respondent's pickets, Robinson, Laird, or Walters, orally appealed to McCullough, an employee of a neutral employer making a delivery to a neutral employer, not to cross the picket line. For these reasons, it is found that during this period the Respondent induced

and encouraged *employees* of *neutral* employers to engage in a work stoppage.

c. *From early June to June 23.*

In early June, when the new "south gate" was demolished, the picket returned to his original position at the only remaining entrance to the project. As they had all along, employees of neutral employers, of necessity, utilized this entrance—the only one left. Thus, as before, the picketing induced and encouraged these employees not to cross the picket line. But the pickets did not only carry a sign. During this period, upon instructions of Erickson, *they also maintained a written record of the identity of individuals and the license numbers of vehicles crossing the picket line.*[1] Such recording constituted additional inducement and encouragement of employees of neutral employers not to cross the picket line.

2. Object.

a. *Contentions of the parties*

The complaint alleges that "(an object (of the inducement and encouragement) was and is to force or require Gulf Coast Wood Mechanical Contractors, Delta Steel Company, and other persons . . . to cease doing business with Gulf Electric." In his brief, the General Counsel contends:

[1] I need not, and do not, decide whether, as the General Counsel and Gulf Coast contend, such listing was engaged in even *before* the establishment of the new "south gate." Nor need I decide whether the Respondent induced or encouraged employees of neutral employers not to work in the project during the period when the separate "south gate" was in existence.

"A brief review of . . . the record as a whole will reveal a scheme on the part of (the) Respondent to force Gulf Coast and other persons to cease doing business with Gulf Electric."

The answer denies the allegations of the complaint. Pointing out in its brief that "the picketing at all times was conducted in keeping with the *Moore Dry Dock* standards" and that "While important, the location of the union's activities is not conclusive," the Respondent contends that the General Counsel has failed to prove "that the objectives of Local 480 were to compel Gulf Coast to cease doing business with Gulf Electric."

b. *Conclusions.*

The United States Court of Appeals for the Second Circuit, speaking through Judge Moore, recently stated:

> In determining the objectives of Local 25, the Board is entitled to look to the totality of the union's conduct, and it is not bound by the union's signs or professed object in picketing. (Cases cited.) *The fact that the union might have had other, valid reasons for picketing—e.g., to enforce area standards—does not absolve it from having an illegal objective.*

Applying that principle to the instant case, the record herein contains clear and convincing evidence that an object of the Respondent's conduct was proscribed by Section 8(b) (4) (B) of the Act.

N.L.R.B. v. Local 25, International Brotherhood of Electric Workers, AFL-CIO (Emmet Electric Co.) 66 LRRM 2355, 2357-58 (C.A. 2).

1. Where, as here, a common situs is involved, the Board in *Moore Dry Dock*[1] laid down certain standards to aid in determining whether picketing is primary or secondary. One standard is that picketing "limited to places reasonably close to the location of the *situs*" may be considered primary.[2] Here, however, Erickson admittedly did *not* seek permission from Gulf Coast to picket inside the Tracetown project closer to the place where Gulf Electric's employees were working. Thus, the possibility that neutrals would become involved was enhanced.

2. The executive board of the Respondent met on March 15. The minutes of this meeting contain the following entry under the heading "Business Manager reports":

> Our sister local, No. 605 has crossed our picket line on the Natchez Miss. Tracetown shopping Center job.

In addition, Erickson admitted reporting to the Respondent's members or executive board that members of the Plumbers' Union were working behind the picket line. (As Gulf Electric was the *electrical* subcontractor, these plumbers presumably worked for a neutral employer.) This reveals the Respondent's interest in keeping employees of neutral employers from working inside the Tracetown project.

3. On the morning of March 22, at Worley's request, Erickson temporarily removed the picket. That night a regu-

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[1] *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547.

[2] *Teamsters Local Union No. 408 (Chas. S. Wood & Co.)*, 132 NLRB 117, 125.

lar meeting of the Respondent's membership was held. The minutes contain the following entry:

> Bro. Erickson reported on results of picket on Natchez Tracetown job. Wood Mechanical & Electrical has been awarded the electrical labor on this job.

Erickson admitted that he had spoken to Worley on the telephone earlier that day, and that he informed the membership at the meeting that the picket had been removed. On the basis of these admissions and the above-quoted entry in the minutes, it is concluded that Erickson took down the picket line temporarily that day because he understood (rightly or mistakenly) that Gulf Coast had awarded or would award to Wood (a firm with which the Respondent had a collective-bargaining contract) all the electrical work previously subcontracted to Gulf Electric; in short, that Gulf Electric would be eliminated from the Tracetown project.

4. On the morning of March 23 Bruce Worley, assistant vice president of Gulf Coast, J. B. Fleming, an official of Gulf Electric, and Paul Gilmet, Gulf Electric's general superintendent, conferred with Erickson in Worley's trailer. Worley, on behalf of Gulf Coast, offered: "From now on we will pay the union wage scale to Mr. Fleming's men. We will maintain the working standards, whatever they are." He asked: "would this satisfy Mr. Erickson's requirements?" Erickson was noncommittal. Fleming "offered to sign an agreement with Mr. Erickson, a working agreement for that job only." Erickson declined. On March 25, in a telephone

[10] Erickson testified that the entry was erroneous. I do not credit this uncorroborated testimony.

conversation with Dixon Pyles Esq., the Respondent's attorney. Worley repeated his offer to pay the electricians employed at the Tracetown project "the union wage rate, (and) we would abide by any established working condition." Pyles promised "to look into it." Worley heard nothing more concerning his offer or Fleming's. Pickets remained posted at the jobsite for approximately 3 months thereafter. This indicates the Respondent's lack of interest in obtaining area wages and working conditions for Gulf Electric's employees.

A prehearing statement given by Erickson to a Board agent was put into evidence. It contains the following paragraph:

> During our conversation in Worley's trailer on the morning of the 23rd, some one either Worley or Fleming asked me for a copy of our contract so that they could look it over and see what the area scale and working conditions were. I told them I would give them one. However, I never did.

Moreover, Erickson admitted that, before establishing the picket line, he had made no attempt to contact any official of Gulf Electric. This further underscores the Respondent's *apathetic attitude* toward securing standard wages and working conditions for employees of Gulf Electric.

It may be that the protection and maintenance of area standards was one of the objects of the Respondent's con-

The findings regarding the March 23 meeting and the March 25 telephone conversation are based upon Worley's testimony. It is found that, during the March 25 telephone conversation, Pyles was an agent of the Respondent acting within the scope of his authority to receive communications from Worley regarding this labor dispute.

duct, but in my opinion it clearly was not the sole object. Consideration of the five factors discussed above convinces me "that an object of the picketing was to put pressure upon Gulf Coast, a neutral, so that it would cancel its contract with Gulf Electric, the primary employer, and the latter firm would be banished from the Tracetown project. Such an attempt to enmesh Gulf Coast in a dispute not of its own making violates Section 8(b)(4)(i)(B) of the Act.

c. *Violation of Section 8(b)(4)(ii)(B).*

The complaint alleges that since on or about February 28, the Respondent "has threatened, coerced, and restrained Gulf Coast, Wood, Delta, and other persons" and that an object of this conduct "was and is to force or require Gulf Coast, Wood Mechanical Contractors, Delta Steel Company, and other persons . . . to cease doing business with Gulf Electric." The answer denies these allegations.

It is found that by picketing from February 28 to March 15 or 30, and from early June to June 23, which caused employees of neutrals to withhold their services, by appealing to McCullough not to cross the picket line, and by *maintain-*

The General Counsel and Gulf Coast contend that many other matters (including the fact that before the picket line was established Erickson notified officials of other unions in the Natchez area of his plan) prove the illegal object of the picketing. However, I base my finding only on the five enumerated factors. *I deem it unnecessary to decide whether other facts also support the conclusion reached, as such decisions would merely be cumulative and would not alter the recommendation which I make herein. Local 171, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Joseph J. Bancs, D/B/A Bancs Floor Covering), 167 NLRB No. 138; and Building and Construction Trades Council of Fond du Lac County, et al. (Roger W. Peters Construction Co., Inc.), 168 NLRB No. 81, footnote 1.*

ing a written record from early June to June 23 of the identity of individuals and the license numbers of vehicles crossing the picket line, the Respondent threatened, coerced, and restrained Gulf Coast, Wood, and Delta, all of whom were engaged in commerce or in an industry affecting commerce. For reasons set forth above, it is concluded that an object of this conduct was to force or require Gulf Coast to cease doing business with Gulf Electric. Accordingly, this conduct was proscribed by Section 8(b)(4)(ii)(B) of the Act. [14]

Upon the above findings of fact and upon the entire record of this case, I make the following:

CONCLUSIONS OF LAW.

1. Gulf Coast Building and Supply Company, Inc., Gulf Electric Construction Co., Inc., Wood Mechanical Contractors, and Delta Steel Company are, and at all material times have been, engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[14] See *Asbestos Workers Local Union No. 16 (Cal-Neva Insulation Company)*, 163 NLRB No. 63.

[15] The General Counsel produced evidence tending to show that on March 6 Riddle and Hale, masonry contractors, entered the Tracetown project and that the picket told them: "Don't cross the picket line." In his brief, the General Counsel states: "The evidence does not support the allegation that the utterances directed toward Hale and Riddle constitute a separate violation of Section 8(b)(4)(ii)(B) of the Act and the General Counsel does not seek a finding on this basis." In view of this statement, I place no reliance on this alleged incident in concluding that the Respondent violated that section of the Act.

2. International Brotherhood of Electrical Workers, Local 480, AFL-CIO, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging individuals employed by persons engaged in commerce or in an industry affecting commerce to engage in a strike or refusal to perform services, with an object of forcing or requiring Gulf Coast Building and Supply Company, Inc., to cease doing business with Gulf Electric Construction Co., Inc., the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i)(B) of the Act.

4. By coercing or restraining persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Gulf Coast Building and Supply Company, Inc., to cease doing business with Gulf Electric Construction Co., Inc., the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

5. The above-described unfair labor practices tend to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this case, I make the following:

RECOMMENDED ORDER

It is recommended that International Brotherhood of Electrical Workers, Local 480, AFL-CIO, Jackson, Mississippi, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any person engaged in commerce or an industry affecting commerce, other than Gulf Electric Construction Co., Inc., to engage in, a strike or refusal in the course of their employment to perform any services, where an object thereof is to force or require Gulf Coast Building and Supply Company, Inc., or any person, to cease doing business with Gulf Electric Construction Co., Inc.

(b) Threatening, coercing, or restraining any person, engaged in commerce or an industry affecting commerce where an object thereof is to force or require Gulf Coast Building and Supply Company, Inc., or any other person, to cease doing business with Gulf Electric Construction Co., Inc.

2. Take the following affirmative action, which it is found will effectuate the policies of the Act:

(a) Post at its business offices and meeting halls in Jackson, Mississippi, copies of the attached notice marked "Appendix." Copies of the said notice, on forms provided by

In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In

the Regional Director for Region 15, after being duly signed by a representative of the Respondent, shall be posted by it immediately upon receipt thereof, and shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material."

(b) Sign and return copies of the said notice to the said Regional Director for posting by Gulf Coast Building and Supply Company, Inc., Wood Mechanical Contractors, and Delta Steel Company, should these companies be willing, at all places where notices to their employees are customarily posted.

(c) Notify the said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith."[16]

Dated at Washington, D.C.

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the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[16] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the day of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE

TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 480, AFL-CIO, AND TO EMPLOYEES OF FIRMS WORKING ON, OR DELIVERING TO, THE TRACETOWN SHOPPING CENTER IN NATCHEZ, MISSISSIPPI

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage any person engaged in commerce or an industry affecting commerce, other than Gulf Electric Construction Co., Inc., to engage in, a strike or refusal in the course of their employment to perform any services, where an object thereof is to force or require Gulf Coast Building and Supply Company, Inc., or any other person, to cease doing business with Gulf Electric Construction Co., Inc.

WE WILL NOT threaten, coerce, or restrain any person engaged in commerce or an industry affecting commerce, where an object thereof is to force or require Gulf Coast Building and Supply Company, Inc., or any other person, to cease doing business with Gulf Electric Construction Co., Inc.

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 480, AFL-CIO
(Labor Organization)

Dated ..... By .....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members or employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, T6024 Federal Building (Loyola), 701 Loyola Avenue, New Orleans, Louisiana 70113, Telephone 527-6361.

APPENDIX B.

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT.

No. 22146.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 480, AEL-CIO,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Argued Feb. 26, 1969.

Decided April 16, 1969.

Before BURGER, WRIGHT and ROBINSON, Circuit Judges.

J. SKELLY WRIGHT, Circuit Judge:

The National Labor Relations Board found that Local 480 of the International Brotherhood of Electrical Workers violated the secondary boycott section of the National Labor Relations Act, Section 8 (b) (4) (i) and (ii) (B). For

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29 U.S.C. § 158(b) (4) (i) and (ii) (B) (1964):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) (i) to engage in, or to induce or encourage any individual

the reasons stated herein, we deny the petition for review and order enforcement of the Board's order.

I.

Gulf Coast Building and Supply Company was the general contractor for construction of a shopping center in Natchez, Mississippi. It used Gulf Electric Construction Company (no affiliation with Gulf Coast) as its electrical subcontractor. Gulf Electric was not a union employer. Construction of the shopping center began in January 1967. On February 28 the union started picketing the single entrance gate to the construction site. The union claimed that its sole dispute was with Gulf Electric, the dispute being that Gulf Electric did not pay area wage scales and did not follow area working standards which were adhered to by union electrical employers, thus undermining those scales and

employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]"

The decision and order of the Board are reported at 172 N.L.R.B. No. 64 (June 26, 1968).

standards. The sole purpose of the picketing, according to the union, was to pressure Gulf Electric into meeting the area scales and standards.

Consistent with the union's avowed purpose, the pickets carried signs which read:

NO DISPUTE WITH
ANY OTHER EMPLOYER
I.B.E.W. LOCAL 480
PROTESTS
SUB STANDARD
WAGES AND
CONDITIONS
OF
GULF ELECTRIC CONSTR. CO., INC.
ELECTRICAL CONTR.
NO DISPUTE WITH
ANY OTHER EMPLOYER

The pickets were instructed to tell any persons who asked whether to cross the picket line that the pickets could not tell them what to do—that they should just read the sign.

The picketing lasted, with one short break, until June 23, 1967, at which time it was voluntarily stopped. The pickets patrolled at the sole gate to the construction site until March 1967 when Gulf Coast built a second gate for use solely by employees of Gulf Electric; until this second gate was demolished in June, the pickets restricted their picketing to this special gate. During the course of the picketing some employees of Gulf Coast and of other subcontractors

working at the site, as well as some persons delivering supplies to the site, refused to cross the picket line.

In July 1967 Gulf Coast filed unfair labor practice charges against the union. At the hearing before the Board trial examiner, the union's position was that its dispute was solely with the primary party, Gulf Electric, and that its picketing followed the guidelines for picketing one subcontractor at a common construction site as set out in the Board's decision in *Moore Drydock*.[1] However, the trial examiner found, and the Board affirmed, that the union had an unlawful secondary object of its picketing: to force Gulf Coast to sever its contract with Gulf Electric and hire a union electrical subcontractor instead.

In reaching this conclusion, the trial examiner (and the Board) relied upon substantial evidence, including certain actions of the union in refusing to cooperate with Gulf Electric and Gulf Coast when they attempted to satisfy the union's stated picketing demands, which, the Board concluded, showed that the union's real aim was not forcing Gulf Electric to meet area standards but to force Gulf Coast to replace Gulf Electric.

We affirm the Board's order on the basis of this evidence. We reject the union's contention, discussed *infra* in Part IV, that the Board relied upon impermissible evidence in finding a violation of the Act.

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[1] Sailors' Union of the Pacific [Moore Drydock], 92 N.L.R.B. 547 (1950).

II.

It is conceded that if the union's sole object was to get Gulf Electric to pay area standards, and the union's actions were not intended to pressure neutral employers to cease doing business with Gulf Electric, and the means used by the union were reasonably limited to accomplish its primary object, then the union's actions did not constitute a secondary boycott. On the other hand, it is also conceded that if the union did have the purpose of forcing or coercing Gulf Coast to sever its ties with Gulf Electric, and the union's picketing was designed to accomplish that purpose, then the union's actions amounted to a secondary boycott, prohibited by Section 8(b)(4)(i) and (ii)(B) of the Act.

In *Moore Drydock* the Board

> "set out four standards for picketing in [common situs] situations which would be presumptive of valid primary activity: (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer. These tests were widely accepted by reviewing federal courts. . . ."

Local 761, Int. U. of Electrical etc. Workers v. N. L. R. B. [General Electric], 366 U.S. 667, 677, 81 S.Ct. 1285, 6 L.Ed.2d 592 (1961). Here Gulf Electric, the primary employer, was doing its normal business on the premises of the secondary employer, Gulf Coast. The picketing was limited to these premises; it took place at the sole gate to the situs.

later shifting to the special gate built for Gulf Electric. The picket signs stated clearly and unequivocally that the dispute was only with Gulf Electric. Thus the *Moore Drydock* guidelines were followed.

The Board, however, in determining whether the picketing was secondary, went beyond the union's avowed primary purpose and its compliance with *Moore Drydock*. The Board relied on the following evidence: the union did not, before, or for almost a month after, the picketing began, make any attempt to verify, by meeting with Gulf Electric, that its wages and working conditions were substandard. Further, at a meeting on March 23 attended by a representative of Gulf Coast, Gulf Electric's general superintendent, Fleming, and the union's business manager, Erickson, Fleming asked for a copy of the union's area contract so that Gulf Electric could determine how it was failing to meet area standards; Erickson never provided Fleming with this information. At the same meeting the representative of Gulf Coast offered to pay the difference between Gulf Electric's standards and the area standards; Erickson said he could not make such a commitment at that time, but would have to check with Mr. Pyles, the attorney for the union. Neither Erickson nor Pyles ever responded to Gulf Coast regarding this offer.[1]

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[1] The trial examiner found that Pyles was an agent of the union in his actions during a phone call from Gulf Coast in which he claimed that he was unaware of this offer. On brief here, the union argues strenuously that Pyles was just the attorney for the union, not the union's agent. However, we need not decide this issue. As seen in text, the relevant actions here were the union's failures to respond to the offers of Gulf Coast and Gulf Electric. Whatever role Pyles may have played in this, it is clear that Erickson, the union's chief agent, never responded to the offers.

Finally, the picket line was suspended during one day, March 22. The trial examiner found that picketing was stopped by Erickson when he believed, based on conversations with Gulf Coast, that Gulf Coast was replacing Gulf Electric with another electrical subcontractor, a union employer which had a collective bargaining agreement with the union. The picketing resumed the next day when Gulf Coast failed to carry through with this plan.

[1] The Board concluded that the union's equivocal responses to offers aimed at meeting the union's demand for area standards, plus the union's clear and quick response to the suggestion that Gulf Electric be replaced by a union employer, indicated that the union's picketing was aimed at Gulf Coast, with the object of forcing Gulf Coast to replace Gulf Electric. The Board took the position, and

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It may be that the sequence of the offers by Gulf Coast and Gulf Electric to "meet" the union's ostensible demands and then to hold out to the union the promise of replacing Gulf Electric with a union contractor were simply traps, aimed at forcing the union into a position where it looked as if it had an unlawful secondary object. Bargaining between employers and unions in labor disputes is often not chivalrous, and both sides need a fair degree of sophistication. Perhaps so as not to betray its naiveté, the union has not claimed the offers here were in fact bait. We note that trial examiners are often attuned to such possibilities. The trial examiner's opinion in Plumbers Local Union No. 519, etc. v. N.L.R.B., 135 U.S.App.D.C. . . ., 416 F.2d 1120 (1969), pointed out that the conduct of the employers in that case was a trap: "The thought, presumably, was that if the Union bit at the bait this would impale it as a picketer for an object of forcing Babcock [the secondary employer] to terminate Robertson [the primary employer]." The examiner thus discounted the union's agreement there to stop picketing if a union employer was hired to replace the nonunion primary employer, pointing out that the union could hardly have responded otherwise since the replacing of the primary employer would have left the union nothing to picket about (the dispute was to force the primary employer to follow area

argues here, that when such an object can be shown in a common situs picketing situation, a violation of the Act is made out despite the union's formal compliance with the *Moore Drydock* guidelines. We agree.

III.

It has been well recognized that the prohibitions of Section 8(b) (4) (i) and (ii) (B) cannot be interpreted literally; what is rather called for is fine linedrawing between primary and secondary activity. *General Electric, supra.* Further, "[i]mportant as is the distinction between legitimate 'primary activity' and banned 'secondary activity,' it does not present a glaringly bright line." *Id.*, 366 U.S. at 673, 81 S.Ct. at 1289. The Supreme Court, and this court, have made clear that the key factor is the *objective* of the union activity, whether it is aimed at the primary employer or whether it is also aimed at pressuring the secondary employer. N. L. R. B. v. International Rice Milling Co., 341 U.S. 665, 672, 71 S.Ct. 961, 95 L.Ed. 1284 (1951); Seafarers International Union v. N. L. R. B. [Salt Dome], 105 U.S. App. D.C. 211, 216, 265 F.2d 385, 590 (1959). It is thus the difficult task of the Board to examine activity which has both primary and secondary effects and to determine whether the secondary effects were truly an objective of the activity.

Given the delicacy of this task, it is obvious that the Board needs both general guidelines and a flexible approach.

standards). It is, of course, for the examiner and the Board to make the first inferences about when offers by employers in disputes of this sort are nothing more than, in the words of the examiner in *Plumbers Local Union*, "hanky-panky."

The *Moore Drydock* standards were set up as such guidelines, but as long as 1955 we noted that there could be no "rigid rule" for determining what is primary picketing and what is secondary. Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, etc. v. N. L. R. B., 97 U.S.App.D.C. 173, 176, 229 F.2d 514, 517 (1955); cert. denied, 351 U.S. 972, 76 S.Ct. 1025, 100 L.Ed. 1490 (1956). Thus in a sequel to *Sales Drivers* we held that although the union picketing appeared to square with the *Moore Drydock* requirements, the Board was correct in finding from external evidence that the picketing had the unlawful secondary object of coercing neutral employers to cease doing business with the primary employer. Truck Drivers & Helpers Local Union 728, etc. v. N. L. R. B., 101 U.S.App.D.C. 420, 249 F.2d 512 (1957), cert. denied, 355 U.S. 958, 78 S.Ct. 543, 2 L.Ed.2d 533 (1958).

[2] In other words, compliance with the *Moore Drydock* standards is "presumptive" of valid primary picketing. *General Electric*, *supra*, 366 U.S. at 677, 81 S.Ct. 1285, but the Board is not thereby relieved of carrying out its duty under the Act: determination of whether the object of the picketing is truly primary or not. The Ninth Circuit put it clearly in the recent case of N. L. R. B. v. Northern California District Council of Hod Carriers, 389 F.2d 721, 725 (1968):

> * * * *Moore Drydock* does not establish a formula whereby picketing with a secondary object can be done

The reverse is true as well. Where a union's picketing departs from the standards of *Moore Drydock*, that may be presumptive of a violation of § 8(b) (4) (i) (ii) (B), but it is open to the union (and the Board) to demonstrate that the picketing was not secondary. Plumbers Local Union No. 519, etc. v. N.L.R.B., *supra* Note 5.

lawfully. Rather it simply establishes a[n] evidentiary aid for the Board to determine the object of picketing where the other evidence is equivocal. The Board is not bound by the inference of lawfulness from compliance with the *Moore Drydock* standards. * * *"

This is the approach the Board applied to the case here. The external evidence credited by the examiner satisfied the Board that the *Moore Drydock* presumption of legality had been overcome.

IV.

The union contends that the examiner and the Board relied on evidence of the secondary *effect* of picketing to conclude that the picketing had a secondary *object*. The union argues that this is an impermissible bootstrap operation and accordingly the Board's order should be reversed or the case remanded. We agree that it would be impermissible for the Board to conclude from the secondary *effect* of picketing that it had a secondary *object*. The two must be kept separate. Otherwise all common situs picketing would be effectively outlawed, since union employees of neutral employers traditionally respect picket lines. A secondary el-

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In this case, as in *Plumbers Local Union No. 519, supra* Note 5, the situation presented involves common situs picketing. As the Supreme Court has recently observed, the considerations are different when the picketing is at the situs of the primary employer:

"* * * [P]rotected primary picketing 'has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt.' * * * including other employers and their employees. * * *"

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 388, 89 S.Ct. 1109, 1121, 22 L.Ed.2d 344 (1969) (quoting from United Steelworkers of America, AFL-CIO v. N.L.R.B., 376

fect is but one evidentiary factor which may shed light on the object of the actors.

The proviso in Section 8(b)(4)(i) and (ii)(B), "*Provided*, That nothing contained in this clause (B) shall be construed to make unlawful * * * primary picketing * * *," makes clear that this was not the Act's intention. We dealt with this problem at length in *Salt Dome*, *supra*:

> "* * * It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises. Thus some of the business relations between the two employers would automatically cease. The union knows this will be the result if, as it hopes, its picket line at the premises of the primary employer is honored. * * *"

105 U.S.App.D.C. 217, 265 F.2d at 591. We noted that such knowledge and hope on the part of the union is not a sufficient basis on which to find a violation of the Act. Rather,

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U.S. 492, 499, 84 S.Ct. 899, 11 L.Ed.2d 863 (1964)]. Further, even in some common situs situations picketing can be explicitly aimed at secondary employees:

> "* * * It is difficult to formulate many generalizations governing common situs picketing, but it is clear that secondary employers are not necessarily protected against picketing aimed directly at their employees. In Electrical Workers v. NLRB [366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed.2d 59 (1961)], for example, we noted that striking employees could picket at a gate on the struck employer's premises which was reserved exclusively for employees of the secondary employer, to induce those employees to refuse to perform work for their employer which was connected with the struck employer's normal business operations. * * *"

Id. at 389.

the Board must resort to other means to determine whether the union had a secondary object. One way would be to see whether there was substantial variance with the *Moore Dry-dock* standards; another, as described in Part II, *supra*, is to determine from external actions or statements what the object of the union is. Although it may sometimes be difficult, the Board must confine itself to these means.

It is, of course, somewhat naive to expect anyone to delineate with precision the philosophical difference between a man's hope and his desire, or the psychological difference between a man's informed wish and his intent. Pushed to

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In Local 761, Int. U. of Electrical etc. Workers v. N.L.R.B., 366 U.S. 667, 673, 81 S.Ct. 1285 (1961), the Supreme Court quoted from this court's opinion in *Salt Dome* (Seafarers' Int. U. v. N.L.R.B., 105 U.S.App. D.C. 211, 265 F.2d 585 (1959)). The Court approved our language regarding the difference between knowledge and hope on the one hand and object on the other. The Court also quoted from N.L.R.B. v. Local 294, Int. Brotherhood of Teamsters, 2 Cir., 284 F.2d 887, 890 (1960):

> " 'Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success.' "

366 U.S. at 673, 81 S.Ct. at 1289. The Supreme Court went on to say:

> "But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck [primary] employer. * * *
>
> "However difficult the drawing of lines more nice than obvious, the statute compels the task. * * *"

Id. at 673-674, 81 S.Ct. at 1290.

"No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermixing metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of 'secondary' conduct; it has drawn no lines more arbitrary, tenuous, and shifting

the extreme, the whole notion of distinguishing between primary and secondary activity runs up against the premise of the law that a man intends the known and probable consequences of his actions. If this principle were applied in determining Section 8(b)(4)(i) and (ii)(B) violations, the Act's attempt to distinguish between primary and secondary activity would abort.

Fortunately for the courts, our task is simply to let the Board first divine these distinctions, and to give the Board great weight in inferring, or not inferring, motive and intent from actions. It is not simply cowardice which impels the courts to take this distant role. Given the tenuous philosophical underpinnings of this aspect of the law, it is apparent that the judgment of what is primary and what is secondary is a pragmatic one, based on an overall impression of the parties' actions and an understanding of their relevant strengths and interests. And this type of pragmatic judgment is best made by the agency which views the battle at first hand.

[3] In this case we disagree with the union that the Board or the examiner simply relied on the evidence of secondary effect and concluded from it that the union had an impermissible object. Rather, although its opinion might have been clearer on this point, we think that this evidence was only used to note that the union's picketing had the predictable secondary consequences, *i.e.*, that neutral employees did respect it. The examiner and the Board did not

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than those separating "primary" from "secondary" activities. * * *" *Jacksonville Terminal Co., supra* Note 7, 394 U.S. at 386-387, 89 S.Ct. at 1120.

stop there; they went on, using the external evidence described above, to show that the union's object was, in fact, secondary. The picketing, which had both a secondary object and a secondary effect, was then held to violate the Act.

Petition for review denied and cross-petition for enforcement granted.

APPENDIX C.

EXCERPTS FROM INSTRUCTIONS TO JURY.

GULF COAST BUILDING & SUPPLY COMPANY, INC.,

Plaintiff,

versus

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 480, AFL-CIO,

Defendant.

Local Number 480 was under a duty to expressly instruct employees and suppliers of Gulf Coast Building and Supply Company, Inc., Wood Mechanical Contractors, and Natchez Sand and Gravel Company, that they were free to cross the picket line at Tracetown.

Local Number 480, that's the defendant, was under a duty to instruct employees and suppliers of Gulf Coast Building and Supply Company, the plaintiff, who had ceased work and who refused to cross their picket lines as a result of Local 480's picketing, to return to work and cross such picket line without violating any duty to said labor union.

You are instructed as a matter of law that even though defendant's picketing was peaceful and even though its objective or purpose were lawful, still if an incidental, and inescapable, and undeniable purpose, result and effect of

the method employed by the union were to induce or force plaintiff's employees and suppliers not to cross the union's picket line to serve plaintiff because of a labor dispute of the union with one of plaintiff's subcontractors, Gulf Electric, then the defendant union would be liable to the plaintiff in damages therefor. (R. 481.)

* * *

In order to prove plaintiff's claim the burden is on the plaintiff to establish by a preponderance of the evidence in the case the following facts: First, that at or about the time and place alleged, defendant union knowingly induced and encouraged one or more employees of Gulf Coast Building and Supply Company, Inc., Wood Mechanical Contractors or Delta Steel Company to cease work or to cease to perform services for the plaintiff. Second, that defendant union so induced and encouraged such employee or employees of Gulf Coast Building and Supply Company, Inc., Wood Mechanical Contractors and Delta Steel Company to cease work, or to refuse to perform services with the object or purpose or intent to force or require Wood Mechanical Contractors and Delta Steel Company to cease doing (R. 482) business with the plaintiff. Third, that such acts and conduct of defendant union were a proximate cause of some injury and consequent damage to the business and property of the plaintiff.

There are four standards for picketing in common situs situations which are presumptive of valid primary activity: One, that the picketing by IBEW Local 480 was at all times limited to the times when the situs of the dispute was located

on the secondary premises, that is the Tracetown project in Natchez. Two, that Gulf Electric was engaged in its normal business at the situs, that is at Tracetown project. Three, that picketing took place reasonable (sic) close to the situs. Four, that the picketing clearly disclosed that the dispute was only with Gulf Electric.

If your unanimous findings to each of the four standards are in the affirmative, then you may indulge a presumption of valid primary activity on the part of IBEW Local 480, the defendant, in its picketing of Gulf Electric. It then becomes the duty of the plaintiff to prove by a preponderance of the evidence that the actions as well as the objective of IBEW Local 480 was unlawful and invalid.

An act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident or other such reason.

The factual issues to be determined by the jury in this case are did defendant, IBEW Local 480, during the period (R. 483) between February 28, 1967, and June 23, 1967, at the Tracetown project in Natchez, Mississippi, knowingly induce or encourage one or more employees or suppliers of or subcontractors of Gulf Coast Building and Supply Company to cease work, strike, and refuse, in the course of their employment, to perform service for said employer.

If your unanimous answer to this question is "no" you should return a verdict in favor of IBEW Local 480, the defendant.

However, if your unanimous answer to the question is yes then you must determine a second issue. Did Local 480 so induce or encourage such employee or employees or suppliers or subcontractors of the above named employers to cease work, or to refuse to perform services with the object or purpose or intent to require or force Gulf Coast Building Supply Company, Inc., to cease doing business with Gulf Electric Construction Company, Inc., and with the further object and purpose and intent to require or force Wood Mechanical Contractors and Delta Steel Company to cease doing business with Gulf Coast Building and Supply Company, Inc.

If your unanimous answer to the second question is no you should return a verdict in favor of defendant IBEW Local 480, but if your unanimous answer is yes you should return a verdict for the plaintiff employer for such actual damages to the plaintiff's business as you shall find has been proximately caused (R. 484) by any such unlawful conduct of the defendant IBEW Local Number 480. (R. 485.)

* * *

The key factor in this case is the objective of the union's activity, that is whether the picketing was aimed at Gulf Electric or whether the picketing was intended to pressure the plaintiff, Gulf Coast Building and Supply Company, into ceasing to do business with Gulf Electric, and whether the picketing was intended to pressure Wood Mechanical Contractors and Delta Steel Company to cease doing business with the plaintiff in order to require Gulf Coast Build-

ing and Supply Company to cease doing business with Gulf Electric. (R. 487.)

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